IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 386

FEDERAL POWER COMMISSION, *Petitioner*,

vs.

TEXACO INC. AND PAN AMERICAN PETROLEUM CORPORATION, *Respondents*.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ANSWER OF TEXACO INC. AND PAN AMERICAN PETROLEUM CORPORATION OBJECTING TO THE MOTION OF THE PEOPLE OF THE STATE OF CALIFORNIA AND THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA FOR LEAVE TO FILE BRIEF AMICI CURIAE IN SUPPORT OF PETITIONER

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February, 1964

WAYNE R. SCOTT CO. — LAW BRIEF PRINTING — 507 S. QUAKER, LUther 7-2052 — TULSA, OKLA.

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Respondents, Texaco Inc. and Pan American Petroleum Corporation, for and as their answer to the Motion of the People of the State of California and the Public Utilities Commission of the State of California (California) for Leave to File Brief Amici Curiae in Support of Petitioner, respectfully show:

1. Respondents would not have refused to consent to the filing of California's amici curiae brief if the factual arguments which constitute the brief had at least an arguable basis in the record before the Court in this case. Respondents object to the filing of California's amici curiae brief because such brief consists entirely of factual arguments that on their face amount to allega-

tions of facts not of record in this case and are, therefore, irrelevant and immaterial to the issues to be decided. Under well settled doctrines, review of administrative orders and court decisions must be upon the record, cf. *Burlington Truck Lines, Inc., et al.* v. *United States, et al.*, 371 U.S. 156, 168-169 (1962), and *Lawn* v. *United States*, 355 U.S. 339, 354 (1957). These doctrines apply to review proceedings initiated under Section 19(b) of the Natural Gas Act, 15 U.S.C. § 717r(b). cf. *Colorado-Wyoming Gas Co.* v. *Federal Power Commission*, 324 U.S. 626 (1945) and *Texas Gas Transmission Corp., et al.* v. *Shell Oil Co.*, 363 U.S. 263, 270 (1960).

2. On page 2 of its motion, California states that its "direct concern" is "the issue . . . relating to the power of the Federal Power Commission . . . to prohibit, by . . . rule-making . . . , contractual arrangements which it finds incompatible with the public interest." On page 3 of its motion, California urges the Court to "recognize and approve the power of the petitioner to prohibit, through its rule-making authority, contractual provisions which it finds to be inconsistent with the public interest." However, the entire brief annexed to the motion is addressed to the issue of whether certain extra-record facts exist which allegedly show that the contract provisions discussed by California are "incompatible with the public interest." The question of petitioner's "power" is not discussed in the brief.

3. The filing of amicus curiae briefs containing only factual arguments that patently amount to allegations respecting extra-record facts should not be permitted. This Court is not the proper forum for de novo trial of factual issues, and in particular it is not a proper forum for trial of factual issues which require the introduction of evidence not of record before this Court. The arguments now made in the California brief should have been made to the Federal Power Commission and based on a record of evidentiary facts supporting such arguments. California does not cite the existence of an evidentiary record supporting its

arguments, and if such record exists, it is not before the Court in this case.[1]

4. Illustrative of the lack of factual support for California's arguments is its argument on pages 6 and 7 in its brief:

> "Price can be *definitely* stated and fixed for the full term of a contract. The Commission, in the exercise of its judgment, has recognized this. Moreover, with the initiation of the regulation of producers, the Commission is the overseer of 'just and reasonable' rates and, as an expert body, is qualified to judge the inflationary or deflationary impact the future may have on long-term natural gas contracts."

The Federal Power Commission arguments and the decision in *Sunray Mid-Continent Oil Co.* v. *FPC*, 364 U.S. 137 (1960) contradict this California argument and confirm the non-existence of facts which would support it (see R. 13, 19). Obviously, the record before the Court does not contain any facts which would conceivably serve as a basis for this California argument.

5. Further illustrative of the irrelevance of the California brief are the California arguments which amount to allegations of facts respecting the operation of "favored nation" provisions in producer contracts. The price-changing provisions of the Texaco Inc. contract with Natural Gas Pipeline Company of America (R. 50-52) and the Pan American Petroleum Corporation contract with Colorado Interstate Gas Company (R. 87-88) do not contain a "favored nation" provision, and it is not argued that such contracts could conceivably cause any of the administrative results argued by California. It is evident that the "disturbing fact situation" allegations of California are peculiar to the operation of "favored nation" provisions in that particular situation involving El Paso Natural Gas Company and West Texas Gathering Com-

[1]The absence of citations to the certified record as required under Rule 40 (2) of the Rules of this Court is an indication that the facts argued in the California brief are not of record in this case.

pany. California does not argue that facts exist which show that such "favored nation" difficulties are or will be the general pattern in the industry, or that flexible price-changing provisions in respondents' contracts with other purchasers could result in the "disturbing fact situation" argued by California. Not only is the "disturbing fact situation" argued by California not of record in this case, but it does not represent conditions in the industry generally.

6. Each and every one of California's allegations may be explored, decided and resolved upon proper record in proceedings under Sections 7, 4, and 5 of the Natural Gas Act, including "area rate" cases mentioned by California. cf *Wisconsin* v. *Federal Power Commission*, 373 U.S. 294 (1963. Under the rule of *Burlington Truck Lines, Inc., et al.* v. *United States, et al.*, 371 U.S. 156, 168-169 (1962), and *Lawn* v. *United States*, 355 U.S. 339, 354 (1957), and the doctrines of judicial review of regulatory orders, the Court may not now resolve disputes over whether facts outside the certified record would support California's arguments. It is, therefore, clear that the Court may not determine whether California's arguments of extra-record facts have support, and the California motion for leave to file brief amici curiae in support of petitioner should be denied.

WHEREFORE, it is respectfully requested that the Motion of the People of the State of California and the Public Utilities Commission of the State of California for Leave to File Brief Amici Curiae in Support of Petitioner be denied.

Respectfully submitted,

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